A Survey of Injunctive Relief Under State and Federal Antitrust Laws†

*By John J. Flynn**

Relatively little has been written about equitable relief under state and federal antitrust laws.[1] Equity power in antitrust enforcement means much more than the mere power to restrain a defendant from doing an act for which the plaintiff has no "remedy at law," to order a defendant to remove a nuisance disturbing some equitably recognized right of a plaintiff, or to restrain a defendant from using his property in a manner which will interfere with another's rights. In antitrust, the proverbial chancellor's foot has grown to truly vast proportions. Antitrust equity jurisdiction entails a language all its own: consent decrees, divestiture, dissolution, and divorcement. Equitable relief in an antitrust case may well extend beyond the point of economic correction to become, in effect, economic regulation of an entire industry or segment thereof for several generations.

Concurrent with the grant of equity power in antitrust is the power of the government to proceed criminally.[2] Since a Sherman or Clayton Act violation can also be a violation of section 5 of the Federal Trade Commission Act,[3] the F.T.C. and the Antitrust Division may proceed simultaneously against the same defendant for the same act.[4]

This article is primarily concerned with some of the recurring problems of federal antitrust injunctive relief and the unexplored area of injunctive relief under state antitrust laws. Very often the remedy is as important as the sub-

† Research for this study was supported by funds provided by the Legislative Research Center of the University of Michigan Law School, funds derived from gifts to the University of Michigan by William W. Cook, and funds provided by the Research Committee of the University of Utah. This study is in partial fulfillment of the requirements for the S.J.D. degree, University of Michigan. The views expressed herein are those of the author, and do not necessarily represent the views of any of the sponsors of this research.

* Associate Professor of Law, University of Utah.

[1] *See generally* M. GOLDBERG, THE CONSENT DECREE: ITS FORMULATION AND USE (1962); U.S. DEP'T OF JUSTICE, ATT'Y GEN'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 343 (1955); Brown, *Injunctions and Divestiture*, in ABA SECTION OF ANTITRUST LAW, AN ANTITRUST HANDBOOK 535 (1958); Fraidin, *Dissolution and Reconstruction: A Structural Remedy, and Alternatives*, 33 GEO. WASH. L. REV. 899 (1965); Timberg, *Equitable Relief Under the Sherman Act*, 1950 U. ILL. L. F. 629; Withrow, *A Defense Counsel's View of a Government Civil Antitrust Suit*, 3 ANTITRUST BULL. 49 (1958); Note, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627 (1965); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965); Note, *Divestiture of Illegally Held Assets: Observations on Its Scope, Objective, and Limitations*, 64 MICH. L. REV. 1574 (1966).

[2] One of the criticisms of federal enforcement has been the filing of companion civil and criminal cases against the same defendant for the same violation. The charge has often been made that the criminal case is used as a lever to exert pressure in the negotiations concerning civil relief. If such is the case, it would seem to be an abuse of the criminal process.

[3] FTC v. Cement Institute, 333 U.S. 683, 690–93 (1948); Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); *see* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453–55 (1922).

[4] FTC v. Cement Institute, 333 U.S. 683, 694–95 (1948).

stantive issues in a lawsuit; but just as in war, the remedial phase of the contest does not receive commensurate attention. This is particularly true of antitrust injunctive relief, where the effect the remedy can or should have may be of far-reaching economic consequence. The grant of equity power to the courts under state and federal antitrust laws and the nature of the subject matter they are designed to operate upon, however, have tempered judicial exercise of that power.[5] The overall function of this article is to evaluate the limitations upon the judicial process vis-á-vis the need for adequate injunctive relief to remedy the substantive problems raised in antitrust litigation.

I. SOURCES OF EQUITY JURISDICTION

A. Statutory Basis

Section 4 of the Sherman Act[6] and section 15 of the Clayton Act[7] empower the Attorney General "to institute proceedings in equity to prevent and restrain" violations of the antitrust laws. Section 11 of the Clayton Act[8] authorizes the Federal Trade Commission to issue cease and desist orders against persons violating the Robinson-Patman Act,[9] section 7 of the Clayton Act,[10] and section 3 of the Clayton Act.[11] Section 5(b) of the Federal Trade Commission Act authorizes the Commission to issue cease and desist orders against persons using "any unfair method of competition or unfair or deceptive act or practice in commerce."[12] Congress completed the grant of equity power in section 16 of the Clayton Act by authorizing a private party to bring suit for injunctive relief under the antitrust laws.[13]

At the state level, authority for equitable relief is less clear. In some states both public and private equitable relief is available, in some one or the other, in others neither, and in still other states the question never seems to have arisen. Several state antitrust laws expressly authorize injunctive relief at the request

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[5] Judge Wyzanski's comment concerning the breadth of power conferred upon federal judges in antitrust cases is perhaps the best known:

> In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.

United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[6] 15 U.S.C. § 4 (1964).

[7] 15 U.S.C. § 25 (1964). *See also* 15 U.S.C. § 9 (1964), granting equity power to prevent and restrain combinations in import trade.

[8] 15 U.S.C. § 21 (1964). Section 11 of the Clayton Act also authorizes the I.C.C., F.C.C., C.A.B., and F.R.B. to prevent certain types of restraints of trade in certain regulated industries.

[9] 15 U.S.C. § 13 (1964).

[10] 15 U.S.C. § 18 (1964) (mergers).

[11] 15 U.S.C. § 19 (1964) (interlocking directorates).

[12] 15 U.S.C. § 45(b) (1964).

[13] 15 U.S.C. § 26 (1964).

of state officials,[14] while a lesser number of state statutes authorize private persons to seek equitable relief for antitrust violations injuring them.[15] In some states in which express statutory authority to enjoin antitrust violations has not been given state enforcement officials, judicial decisions have assumed or implied equitable enforcement powers.[16] And, in many of the states with antitrust laws which do not expressly authorize private parties to sue for equitable relief, courts have granted equitable relief at the instance of private suitors.[17] The various justifications for allowing private parties to seek equitable relief, despite an absence of express statutory authority, have included the inadequacy

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[14] *See, e.g.*, ARK. STAT. ANN. § 70-108 (1957) (limited to monopolies); CAL. BUS. & PROF. CODE § 16754.5 (West 1964); COLO. REV. STAT. ANN. § 55-4-5 (1963); HAWAII REV. LAWS § 205A-13 (Supp. 1965); IDAHO CODE ANN. § 48-112 (1948); ILL. ANN. STAT. ch. 38, § 60-7(1) (Smith-Hurd 1966); IND. ANN. STAT. § 23-120 (1964); IOWA CODE ANN. § 551.9 (1950); KAN. GEN. STAT. ANN. § 50-105 (1964); LA. CONST. art. 19, § 14; LA. REV. STAT. § 13.5088 (1951); LA. REV. STAT. § 51.128 (1965); MASS. GEN. LAWS ANN. ch. 93, § 3 (1954); MINN. STAT. ANN. §§ 623.02, 623.03 (1966); MISS. CODE ANN. § 1088 (1956); MO. ANN. STAT. § 416.260(2) (1952); MONT. REV. CODE ANN. § 94-1108 (1947); NEB. REV. STAT. §§ 59-810, -813, -814, -819 (1960); N.Y. GEN. BUS. LAW § 342 (McKinney 1957); N.C. GEN. STAT. § 75-14 (1965); N.D. CENT. CODE § 51-10-06 (Supp. 1965); OHIO REV. CODE ANN. § 1331.11 (Page 1962); OKLA. STAT. ANN. tit. 79, §§ 21, 22 (1965); S.D. CODE § 13.1808 (1939); UTAH CODE ANN. §§ 50-1-7, 50-1-9 (Repl. vol. 1960) (compulsory dissolution of corporation which restrains trade or creates monopoly); VA. CODE ANN. § 59-33 (1950); WASH. REV. CODE ANN. § 19.86.080 (Supp. 1966); WIS. STAT. ANN. § 133.02 (Supp. 1967). Several states also expressly authorize charter forfeiture and ouster of corporations, this being a particularized form of equitable relief comparable to the remedy of dissolution in federal antitrust proceedings.

[15] HAWAII REV. LAWS § 205A-11 (Supp. 1965); ILL. ANN. STAT. ch. 38, § 60-7 (2) (Smith-Hurd 1966); LA. REV. STAT. § 51.129 (West 1965); N.D. CENT. CODE § 51-10-06 (Supp. 1965); VA. CODE ANN. § 59-32 (1950); WASH. REV. CODE ANN. § 19.86.090 (Supp. 1966).

[16] *See, e.g.*, People v. Aachen & Munich Fire Ins. Co. of Germany, 126 Ill. App. 636 (1905); Hunt v. Riverside Co-op. Club, 140 Mich. 538, 104 N.W. 40 (1905).

[17] *See Ala.*: Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 (1930). *Cal.*: Kold Kist, Inc. v. Meat Cutters & Butchers Local 421, 99 Cal. App. 2d 191, 221 P.2d 724 (1950). *Contra*, Overland Pub. Co. v. Union Lithograph Co., 57 Cal. App. 366, 207 P. 412 (1922). *Ga.*: Blackmon v. Gulf Life Ins. Co., 179 Ga. 343, 175 S.E. 798 (1934). *Ill.*: Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822 (1900). *Ind.*: Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N.E. 823 (1909). *Mich.*: Peoples Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960). *Minn.*: Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922). *Mo.*: Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997 (1908). *Contra*, C.H. Albers Comm'n Co. v. Spencer, 205 Mo. 105, 103 S.W. 523 (1907), *rehearing denied sub nom.*, C.H. Albers Comm'n Co. v. Milliken, 245 Mo. 368, 150 S.W. 712 (1912), *appeal dismissed per curiam for want of jurisdiction*, 232 U.S. 719 (1913). *N.H.*: Currier v. Concord R.R., 48 N.H. 321 (1869) (railroad merger). *N.J.*: Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894). *N.Y.*: Eagle Spring Water Co. v. Webb & Knapp, Inc., 236 N.Y.S.2d 266 (Sup. Ct. 1962). *N.C.*: Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948). *Okla.*: Anderson v. Shawnee Compress Co., 17 Okla. 231, 87 P. 315 (1906), *aff'd*, 209 U.S. 423 (1908). *Pa.*: Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940). *Contra*, Tibby Bros. Glass Co. v. Pennsylvania R.R., 219 Pa. 430, 68 A. 975 (1908) (railroad merger). *Tex.*: Turner v. Zanes, 206 S.W.2d 144 (Tex. Civ. App. 1947). *Wash.*: Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). Washington's new antitrust statute provides for private equitable relief. WASH. REV. CODE ANN. § 19.86.090 (Supp. 1966).

of the remedy at law,[18] irreparable harm,[19] the unascertainability of damages,[20] protection of a stockholder's right to enjoin voting of stock held illegally by another,[21] the multiplicity of lawsuits,[22] and the prevention of malicious interference with contractual or property rights.[23] State antitrust law has become a hodgepodge of equity jurisdiction in need of substantial reform if state enforcement is to be revived and fairly applied to interstate commercial activity.

B. Common Law Basis

The growth of equity as an Anglo-American institution was enhanced by the hardening of the arteries of the common law.[24] Indeed, the rigidity of the common law was facilitated by the institution of equity.

With the crystallization of the common law forms of action, equity developed as a supplement to the law, providing a remedy where the law courts would not or could not, or, in general, providing a remedy where the remedy at law was inadequate.[25] But equitable relief has gradually expanded beyond many of its maxims and no longer should be considered as merely supplemental to the law. For example, the old equity maxim that "equity protects property rights, not personal rights,"[26] has been rejected by many courts.[27] The maxim that equity will not enjoin the commission of a crime, apparently because of the adequacy of the "remedy" at law, has been eroded.[28] The institution of equity is used today when the advantages of its procedure or its remedies are superior to those of the traditional actions at law and when it can be applied within the restrictions of state and federal constitutional guarantees of a jury trial.

Several factors promote the availability of equitable relief. Difficulty in ascertaining damages,[29] multiplicity of suits,[30] and absence of realistic damage

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[18] *See, e.g.*, Tallassee Oil & Fertilizer Co. v. Holloway, 200 Ala. 492, 76 So. 434 (1917); Schwartz v. Laundry & Linnen Supply Drivers' Local 187, 339 Pa. 353, 14 A.2d 438 (1940) (Pennsylvania has no general antitrust law).

[19] *See, e.g.*, Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 (1930); Group Health Co-op. v. King County Medical Soc'y, 39 Wash 2d. 586, 237 P.2d 737 (1951).

[20] *See, e.g.*, Kold Kist, Inc. v. Meat Cutters & Butchers Local 421, 99 Cal. App. 2d 191, 221 P.2d 724 (1950); Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902).

[21] Dunbar v. American Tel. & Tel. Co., 238 Ill. 456, 87 N.E. 521 (1909).

[22] *See* Kold Kist, Inc. v. Meat Cutters & Butchers Local 421, 99 Cal. App. 2d 191, 221 P.2d 724 (1950); Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940).

[23] Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353 (1905); Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894).

[24] *See generally* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 150–51, 168–72 (4th ed. 1948); Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87 (1916).

[25] *See generally* 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 1–42a (5th ed. 1941). For an excellent survey of the equitable remedy of injunction see Note, *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994 (1965).

[26] The maxim apparently stems from Lord Eldon's opinion in Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818).

[27] *See, e.g.*, Orloff v. Los Angeles Turf Club, Inc., 30 Cal. 2d 110, 180 P.2d 321 (1947); Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946).

[28] Note, *supra* note 25, at 1014–21, 1024–27.

[29] *See, e.g.*, Orloff v. Los Angeles Turf Club, Inc., 30 Cal. 2d 110, 180 P.2d 321 (1947); Duke of Somerset v. Cookson, 24 Eng. Rep. 1114 (Ch. 1735).

[30] Note, *supra* note 25, at 1001; *see* cases cited note 22 *supra*.

relief[31] have all been mentioned as factors which are avoided by equitable relief. Factors cited as militating against equitable relief usually include the procedural hardships to a defendant of no jury trial,[32] the fact that equitable relief in the form of an injunction often imposes limitations upon the freedom of the individual,[33] and the possibility that a court of equity may be unable to enforce its decree.[34]

Injunctive relief is usually divided into three categories: temporary restraining orders, preliminary injunctions, and permanent injunctions.[35] The temporary restraining order may be granted upon ex parte request, is for a limited period of time, is self-dissolving, and is generally not appealable; the preliminary injunction may be granted after a limited hearing on affidavits, lasts pending the outcome of a trial on the merits, and is appealable; the permanent injunction is granted only after a full hearing on the merits, is said to be perpetual,[36] and is, of course, appealable. A further distinction is drawn between mandatory and prohibitory injunctions:[37] many courts declare that a stronger showing of the necessity for injunctive relief is necessary when a mandatory injunction is sought.[38]

II. Public Injunctive Relief

A. Federal Antitrust Cases

Injunctive relief is especially well suited to the enforcement of the antitrust laws. State and federal statutes have as their general purpose the "promotion of competition in open markets,"[39] and theoretically insure the greatest efficiency at the lowest price and best service to the consumer, with the most appropriate allocation of resources. The flexible remedy of injunction is the only civil device available, within the context of a judicially enforced antitrust policy, for achieving these ends in a market clogged by anticompetitive restraints. During the first seventy years of federal antitrust law enforcement, 615 of the 770 civil antitrust cases instituted by the Department of Justice were pursued to some type of equitable remedy. One hundred thirty-eight of the

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[31] Note, *supra* note 25, at 1001–02.

[32] In Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509–10 (1959), Mr. Justice Black suggested that the Declaratory Judgment Act and the Federal Rules of Civil Procedure, when viewed in light of the seventh amendment, may have a limiting effect upon the availability of equitable relief.

[33] *See* Note, *supra* note 25, at 1008–12.

[34] *Id.* at 1012–13; *see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 161–66 (1948).

[35] This is the classification followed under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 65.

[36] *But see* Note, *Are All Permanent Injunctions Temporary?*, 23 Mich. L. Rev. 382 (1925).

[37] Apparently, this distinction may also be traced to Lord Eldon. *See* Lane v. Newdigate, 32 Eng. Rep. 818 (Ch. 1804).

[38] Note, *supra* note 25, at 1061.

[39] U.S. Dep't of Justice, Att'y Gen's Nat'l Comm. To Study the Antitrust Laws 1 (1955) (footnote omitted). *See generally* Loevinger, *Antitrust, Economics and Politics*, 1 Antitrust Bull. 225 (1955).

cases terminated in injunctive orders following litigation, while the remainder ended in consent decrees.[40]

The incidents of equitable relief under the federal antitrust laws are well known. The antitrust injunction is remedial in nature, and is designed to eliminate the vestiges of transgressions of the past and to prohibit future violations — not to punish defendants for illegal anticompetitive conduct.[41] The government's equitable enforcement power is intended to be used on behalf of the public and, therefore, an injunctive decree in private litigation does not render a subsequent government suit for equitable relief against the same defendant for the same anticompetitive conduct a useless exercise.[42] Nor is intervention by private litigants in an equity case which is being prosecuted for public benefit easily obtained.[43] The express authorization of equitable relief at the government's instance serves the dual function of protecting the public from the continuation of conduct in violation of antitrust principles and of preventing future violations.

Since the Attorney General is authorized to "institute proceedings in equity to prevent and restrain . . . violations"[44] of the antitrust laws, the kinds of enjoinable conduct are many and varied. Vertical[45] and horizontal[46] price fixing, tying contracts,[47] concerted refusals to deal by sellers[48] and buyers,[49] allocation

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[40] Compiled from: COMMERCE CLEARING HOUSE, INC., THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES 1890–1951 (1952) (popularly known as the *CCH Blue Book*); The Federal Antitrust Laws with Summary of Cases Instituted by the United States 1952–1956 Supplement (1957); U.S. Antitrust Cases Summaries 1957–1961 (CCH Transfer Binder 1961).

"Pursued to remedy" means the government won its case against one or more defendants and was granted some form of injunctive relief. One hundred thirty-nine cases were dismissed or otherwise disposed of prior to a litigated judgment. Sixteen civil cases instituted prior to 1960 were still pending at the time these computations were made.

[41] Hartford-Empire Co. v. United States, 323 U.S. 386, 409 (1945).

[42] United States v. Borden Co., 347 U.S. 514 (1954). The government has little control over the formulation of private decrees and is unable to enforce a private decree by contempt proceedings or to seek modification to meet changing circumstances.

[43] *See, e.g.*, United States v. General Elec. Co., 95 F. Supp. 165 (D.N.J. 1950). Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), may have somewhat relaxed the standards for interventon under Rule 24(a) of the Federal Rules of Civil Procedure. It has been persuasively argued, however, that the *El Paso* case will be limited to its special facts — particularly the fact that the Court viewed the lower court divestiture decree and the government's acquiesence therein as a violation of its mandate in a previous appeal by the government in the same case. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); *see* Analysis, BNA's ANTITRUST & TRADE REG. REP. No. 301 B-1 (April 18, 1967).

The discretion to bring a suit or not is absolute in the Attorney General. Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y. 1963).

[44] Sherman Act § 4, 15 U.S.C. § 4 (1964); Clayton Act § 15, 15 U.S.C. § 25 (1964).

[45] *See, e.g.*, United States v. New Wrinkle, Inc., 342 U.S. 371 (1952); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[46] *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

[47] *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947); International Bus. Machs. Corp. v. United States, 298 U.S. 131 (1936).

[48] Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (cease and desist order); United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930).

[49] *See, e.g.*, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

of territories[50] and customers,[51] setting production quotas,[52] monopolization,[53] restraints of trade by abuse of the patent monopoly,[54] and mergers in violation of section 7 of the Clayton Act[55] have all been enjoined by mandatory or prohibitory injunctions. Relief has included divestiture,[56] mandatory rental of a violator's patented machines at reasonable rates,[57] prohibition of bid rigging,[58] prohibition of entering into otherwise legal contractual agreements,[59] the requirement that lessees of patented machines be given an option to continue leasing or to buy,[60] invalidation of lease and other contractual arrangements,[61] the enjoining of lawsuits,[62] and dissolution[63] and divorcement.[64] In *United States v. Grinnell Corp.*,[65] a civil suit seeking to break up monopolization of the automatic fire and burglar alarm business, Judge Wyzanski went so far as to enjoin the corporate defendants from hiring the president of the primary corporate defendant, thereby as a practical matter excluding the president from further work in the field involved.[66] Judge Wyzanski justified this result by applying normal antitrust equity principles to a situation he thought unique:

> [T]o insure that the reforms imposed by this decree are not thwarted by a leader of great capacity but of less than an admirable record of compliance with well-known prescriptions of antitrust law, and to guarantee that there is an entirely effective breaking-up of the channels of

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[50] *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[51] *See, e.g.*, United States v. Servel, Inc., 1954 Trade Cas. ¶ 67,665 (E.D. Pa.) (consent decree); United States v. Decca Records, Inc., 1952 Trade Cas. ¶ 67,402 (S.D.N.Y.) (consent decree).

[52] *See, e.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[53] *See, e.g.*, United States v. Griffith, 334 U.S. 100 (1948); United States v. Singer Mfg. Co., 374 U.S. 174 (1963).

[54] *See, e.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Singer Mfg. Co., 374 U.S. 174 (1963).

[55] *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[56] *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd and remanded*, 384 U.S. 563 (1966).

[57] United States v. Continental Can Co., 128 F. Supp. 932 (N.D. Cal. 1955).

[58] *See* United States v. Ward Baking Co., 376 U.S. 327 (1964).

[59] United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957).

[60] Besser Mfg. Co. v. United States, 343 U.S. 444 (1952).

[61] International Salt Co. v. United States, 332 U.S. 392 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[62] Hartford-Empire Co. v. United States, 323 U.S. 386, 419 (1945).

[63] *See, e.g.*, Hughes v. United States, 342 U.S. 353 (1952); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[64] *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Divorcement is a special form of divestiture designed to secure relief against abuses of integrated ownership or control by requiring divestiture of assets used in or causing vertical or horizontal restraints of trade. *See* Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws — Economic Background*, 19 GEO. WASH. L. REV. 119, 120–21 (1950).

[65] 236 F. Supp. 244 (D.R.I. 1964), *aff'd and remanded*, 384 U.S. 563 (1966).

[66] The corporate defendants enjoined from hiring the defendant-president controlled 87% of the automatic fire and police alarm business. If Judge Wyzanski's assessment of the president's conduct were accurate, it seems unlikely that the companies having the remainder of the business would hire him.

> restraint and monopolization which the present management of Grinnel has dug so deep into the pattern of the CSPS accredited industry, and to make certain that the general public is not further prejudiced by the continued management of defendants by one who has demonstrated defiance of legal prohibitions, no defendant, after April 1, 1966, shall continue in employment as officer, director, employee, consultant, agent or otherwise James Douglas Fleming; but nothing herein shall preclude any defendant from fulfilling any pension or like purely financial arrangement it now has with Mr. Fleming. . . . This provision shall not be construed as in any respect retroactive or punitive; its interpretation shall be strictly prospective and prophylactic; nor shall it be regarded as directed against Mr. Fleming, but against defendants' use of Mr. Fleming, the leader who brought them to this end and cannot be expected to regard a reversal of his policies as suitable marching orders. While this Court does not feel that it can leave Mr. Fleming in the saddle, there is [not] intended in this decretal provision, or in any other part of this opinion and judgment any suggestion that Mr. Fleming lacks financial integrity or honesty of the usual type. He is an "honest man" after the manner of Theodore Roosevelt or Norman Hapgood. . . . He is undoubtedly a man whose virtue the Scotch would appreciate, and of a VIRTU the Italians would applaud. But he appears on this record to have been for well over a decade and a half the vigorous captain of the defendants' conspiracy to monopolize.[67]

On appeal to the Supreme Court the defendants urged and the government conceded that the barring of Mr. Fleming from the employment of any of the corporate defendants was unduly harsh and quite unnecessary. The Court agreed that the record did not require such relief while noting that relief of this kind "may be appropriate where the predatory conduct is conspicuous . . . ."[68]

As is perhaps evident from the *Grinnell* case, the averment that equitable relief is remedial and not punitive has little more content than most of the other meaningless maxims of equity. To suggest that the dispossession of corporate office is directed toward the offending corporation rather than the corporate officer who formulated, directed, and carried out policies violating the antitrust laws only compounds the fiction. The remedy of dissolution of the combination and a general injunction prohibiting future violations upon pain of criminal contempt should serve to deter the most vigorous captain of any conspiracy to monopolize or restrain trade.

A crossing of the theoretical line dividing remedial from punitive antitrust remedies seems prevalent, albeit necessary, in many injunctive decrees. There is no doubt that the courts may not create new duties, prescription of which is the function of Congress; or place the defendants for the future in a different class than other people; or issue a decree which enjoins all possible breaches of the law; or issue a decree which is so vague as to put the whole conduct of the

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[67] 236 F. Supp. at 259–60. The remedy is not quite as unique as some may think. Certain criminal acts may bar union officers from holding office under the Landrum-Griffin Bill. 29 U.S.C. § 504 (1964). Section 8 of the Clayton Act, 15 U.S.C. § 19 (1964), forbids interlocking directorates among competitors. *See* United States v. Sears, Roebuck & Co., 165 F. Supp. 356 (S.D.N.Y. 1958), wherein a corporate officer was required to give up his position with either Sears or B.F. Goodrich Company and was restrained from accepting a position as trustee of the Sears pension trust fund.

[68] United States v. Grinnell Corp., 384 U.S. 563, 579 (1966).

defendant's business at the peril of a summons for contempt; or cause the defendants hereafter not to be under the protection of the law.[69] But injunctive relief has been used for disgorgement of ill-gotten gain,[70] prevention of possible as well as proven violations,[71] and as a means for affirmative government regulation of a particular business or market.[72] While the use of equitable relief for these purposes may be somewhat less than penal, it is also something more than merely remedial.

The use of an equitable remedy to obtain something more than remedial relief should not necessarily be condemned. For example, the use of injunctive power to force disgorgement of ill-gotten gain is certainly akin to the equitable notion of preventing unjust enrichment. Moreover, the widespread use of traditional legal institutions for untraditional purposes in antitrust enforcement[73] suggests a willingness on the part of courts and the bar to treat antitrust enforcement as a special case. Indeed, many have suggested that wider use be made of equitable enforcement power in antitrust matters to restructure oligopoly markets and markets with a high concentration of economic power

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[69] Hartford-Empire Co. v. United States, 323 U.S. 386, 409–10 (1945) (footnotes omited).

[70] *See, e.g.*, United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Aluminum Co. of America, 91 F. Supp. 333, 343 (S.D.N.Y. 1950).

[71] Mr. Justice Jackson spoke of the preventative element in International Salt Co. v. United States, 332 U.S. 392, 400 (1947):

> The short of the contention is that since the company never has threatened to violate any decree entered in this case to restrain future use of the illegal leases, it feels that the provision invalidating the objectionable leases should end the matter and that, as to any additional provisions, appellant is entitled to stand before the court in the same position as one who has never violated the law at all — that the injunction should go no farther than the violation or threat of violation. We cannot agree that the consequences of proved violations are so limited. . . . When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

See also United States v. United States Gypsum Co., 340 U.S. 76 (1950), in which the Supreme Court modified a lower court decree so as to cover restraints of trade in all types of gypsum products and extended coverage of the decree to all sections of the country, even though the complaint only covered restraints of trade in the gypsum board market and was limited to the Eastern United States.

[72] *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Western Elec. Co., 1956 Trade Cas. ¶ 68,246 (D.N.J.) (consent decree). The famous "Mother Hubbard Case," noted in ANTITRUST SUBCOMM. OF THE JUDICIARY COMM., REPORT ON CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE, 86th Cong., 1st Sess. 170–77 (1959) (report pursuant to H. Res. 27), was an action designed to eliminate restraints of trade in the petroleum industry in which the Court attempted extensive regulation of refining and pipelines. For subsequent litigation see United States v. Atlantic Ref. Co., 360 U.S. 19 (1959). *See* Hearing Before Antitrust Subcommittee No. 5, Committee on the Judiciary, H.R., 85th Cong., 2d Sess., part II, vols. 1–3 (1958) (A. T. & T. and Western Electric). For an excellent analysis of affirmative government regulation of the motion picture industry, see Note, *An Experiment in Peventive Anti-Trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees*, 74 YALE L.J. 1041 (1965).

[73] For example, the widespread use of consent decrees and nolo contendere pleas seems to be a pragmatic effort to shelter what is essentially an administrative form of enforcement in a judicial setting, with little of the protections and values of either administrative law or judicial procedure.

incompatible with a high level of competition,[74] workable or otherwise. The theory by which the equitable powers of courts in antitrust matters could be directed to these ends certainly exists, but judicial reluctance to assume such a complex and difficult task acts as a deterrent. While not passing upon the merits of the substantive arguments in favor of and against "trust busting" or the minimization of existing corporate giants as a fundamental goal of antitrust policy, the expansion of the equity power of courts to this end may well reveal that judges too are human and that the judicial process is only capable of so much.[75] If wholesale restructuring of markets or industries is desired, considerable thought must be given to the institution that will implement such a policy. The courts have indicated a distinct reluctance to do so and the Federal Trade Commission as presently understaffed and underfinanced may well be incapable of accomplishing such a goal.[76]

An additional and perhaps underrated feature of antitrust injunctive power is the permanency of the relief granted[77] and the necessity for surveillance and enforcement of a decree. Theoretically, injunctions issued in antitrust cases are subject to modification,[78] and on occasion have been modified.[79] In

[74] *See, e.g.*, M. GOLDBERG, THE CONSENT DECREE: ITS FORMULATION AND USE (1962); G. HALE & R. HALE, MARKET POWER — SIZE AND SHAPE UNDER THE SHERMAN ACT (1958); C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); G. STOCKING & M. WATKINS, CARTELS IN ACTION (1946); Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).

[75] The courts are well aware of their own limitations. In United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), Mr. Justice Douglas observed that although "equity has the power to uproot all parts of an illegal scheme — the valid as well as the invalid — in order to rid the trade or commerce of all taint of the conspiracy," *id.* at 148, "competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken." *Id.* at 162. Mr. Justice Douglas went on to observe that:

> It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective.

Id. at 163.

[76] There is a serious need for revitalizing the F.T.C. and defining its role in relation to the Antitrust Division of the Department of Justice. In particular, the role of the F.T.C. as an expert commission concerned with broad trends in business structure and behavior needs to be emphasized. For an excellent discussion of the role of the commission, the Antitrust Division, and the inter-relationship of these agencies in overall antitrust enforcement see Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609 (1967).

[77] United States v. Aluminum Co. of America, 19 F. Supp. 374 (W.D. Pa. 1937).

[78] The standard "boiler plate" provision inserted at the end of each decree, litigated or by consent, usually reads as follows:

> Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this degree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

United States v. United States Gypsum Co., 340 U.S. 76, 105 (1950) (appendix to opinion of the Court).

[79] United States v. Continental Can Co., 128 F. Supp. 932 (N.D. Cal. 1955); *cf.* Ford Motor Co. v. United States, 335 U.S. 303 (1948).

practice, however, injunctive decrees — litigated or by consent — are seldom modified[80] either at the instance of the defendants[81] or of the government.[82] Judicial opposition to granting modification of injunctive relief seems especially pronounced when the original judgment is entered on a consent decree, since defendants submit to the decree "with their eyes open"[83] or they have "enjoyed or speculated upon [the consent decree's] . . . favorable consequences or possibilities by avoiding the litigation and the hazards of a less favorable outcome."[84] In either case, the fact that the defendants would be better off if the injunction were relaxed is not sufficient; "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions"[85] will justify the modification of an injunctive decree.

A too-trenchant attitude toward injunctive decree modification may well be self-defeating. The *in terrorem* effect of treble damage suits may be outweighed by the realization that an antitrust injunctive decree obtained by consent, for all practical purposes, will not be modified under practically any conditions. A defendant's willingness to litigate rather than capitulate by consent may be expected to increase in direct proportion to judicial inflexibility on modification.

A different type of modification, however, may stimulate a desire on the part of defendants and the government to capitulate rather than to litigate. The Supreme Court has not been reluctant to modify injunctions issued by lower courts[86] and in some instances the Court has rewritten the entire decree.[87] When injunctive relief is inconsistent with existing law, inadequate for purposes of restoring competition or preventing future violations, or based upon erroneous conclusions of fact or law, the Court will step in and modify the decree entered below.[88] Since there is no jury trial and the lower court must

[80] Perhaps the best indication of judicial reluctance to modify injunctive decrees may be gathered from a reading of United States v. Swift & Co., 286 U.S. 106 (1932).

[81] *Id.*; *see* United States v. Lucky Lager Brewing Co., 209 F. Supp. 665 (D. Utah 1962).

[82] Ford Motor Co. v. United States, 335 U.S. 303 (1948); United States v. Aluminum Co. of America, 153 F. Supp. 132 (S.D.N.Y. 1957); United States v. United Shoe Mach. Corp., 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,070 (D. Mass.).

[83] United States v. Swift & Co., 286 U.S. 106, 115 (1932). *See generally* Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967).

[84] United States v. Lucky Lager Brewing Co., 209 F. Supp. 665, 668 (D. Utah 1962).

[85] United States v. Swift & Co., 286 U.S. 106, 119 (1932); *see* United States v. Savannah Cotton & Naval Stores Exch., Inc., 192 F. Supp. 256 (S.D. Ga. 1960), *aff'd per curiam sub nom.*, Turpentine & Rosin Factors, Inc. v. United States, 365 U.S. 298 (1961); United States v. Owens-Corning Fiberglas Corp., 178 F. Supp. 325 (N.D. Ohio 1959).

[86] *See* Note, *Modification of Litigated Antitrust Decrees by the Supreme Court*, 56 COLUM. L. REV. 420 (1956).

[87] *See, e.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

[88] Note, *supra* note 86, at 425. In United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 323 (1961), Justice Brennan stated:

> In sum, we assign to the District Courts the responsibility *initially* to fashion the remedy, but recognize that while we accord due regard and respect to the conclusion of the District Court, we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws. The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it.

make findings of fact and conclusions of law,[89] Supreme Court review of the law and the facts (always prefaced by the remark that wide latitude is given the court below) may be quite extensive.[90] Consequently, an unmeasured but very real weight on the scale of negotiations for both the government and the defendant is the lurking omnipresence of what may happen if the case is appealed to the Supreme Court.

B. State Antitrust Cases

The paucity of state-prosecuted antitrust cases of recent vintage seriously hampers any meaningful evaluation of state injunctive decrees. Not only are many of the cases old,[91] but many involve the enjoining of labor union activity[92] and are of questionable validity today with the expansion of the preemption doctrine in the labor field during the past few decades.[93]

State antitrust equity jurisdiction has been used to enjoin mergers,[94] possible tie-ins,[95] group boycotts,[96] price fixing,[97] anticompetitive joint ventures,[98] cornering of markets,[99] exclusive distributorship arrangements,[100] monopolization,[101] bid rigging,[102] the creation of trusts,[103] the voting of stock in a trust,[104] and the allocation of customers;[105] to dissolve trade associations found to have violated state antitrust prohibitions;[106] and to forfeit the charter of corporations violating state antitrust laws.[107] It seems clear, assuming state antitrust

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[89] FED. R. CIV. P. 52(a).

[90] *See, e.g.*, cases cited note 87 *supra.*

[91] *See, e.g.*, Louisville & N.R.R. v. Kentucky, 161 U.S. 677 (1896); State *ex rel.* Attorney Gen. v. Kansas City Live Stock Exch., 211 Mo. 181, 109 S.W. 675 (1908); State v. Adams Lumber Co., 81 Neb. 392, 116 N.W. 302 (1908).

[92] *See, e.g.*, Denver Jobbers' Ass'n v. People *ex rel.* Dickson, 21 Colo. App. 326, 122 P. 404 (1912); Hunt v. Riverside Co-op. Club, 140 Mich. 538, 104 N.W. 40 (1905); People v. Masiello, 177 Misc. 608, 31 N.Y.S.2d 512 (Sup. Ct. 1941), *aff'd*, 271 App. Div. 875, 66 N.Y.S.2d 641 (1946); People v. Smoked Fish Workers Local 20377, 169 Misc. 255, 7 N.Y.S.2d 185 (Sup. Ct. 1938); Ridge Mfg. Co. v. United Electrical Workers Local 735, 36 Ohio Op. 206, 77 N.E.2d 248 (C.P. Cuyahoga County 1947).

[93] Several Supreme Court preemption decisions in the labor law field have involved state injunctions against union activity based upon restraint of trade theories. *See, e.g.*, Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955). *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 128–35 (1964).

[94] *See, e.g.*, Louisville & N.R.R. v. Kentucky, 161 U.S. 677 (1896).

[95] *See* Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129 (1921).

[96] State v. Aikens, 83 Kan. 792, 112 P. 605 (1911) (per curiam).

[97] State *ex rel.* Taylor v. Anderson, 350 Mo. 884, 254 S.W.2d 609 (1953).

[98] Stockton v. Central R.R., 50 N.J. Eq. 52, 24 A. 964 (Ch. 1892); Morrill v. Boston & M.R.R., 55 N.H. 531 (1875).

[99] Columbus Packing Co. v. State *ex rel.* Schlesinger, 100 Ohio St. 285, 126 N.E. 291 (1919).

[100] State v. Willys-Overland, Inc., 211 S.W. 609 (Tex. Civ. App. 1919).

[101] Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950).

[102] People v. Building Maintenance Contractors' Ass'n, Inc., 41 Cal. 2d 719, 264 P.2d 31 (1953).

[103] State *ex rel.* Attorney Gen. v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279 (1892).

[104] Southern Elec. Sec. Co. v. State, 91 Miss. 195, 44 So. 785 (1907).

[105] Hunt v. Riverside Co-op. Club, 140 Mich. 538, 104 N.W. 40 (1905).

[106] *See* Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910).

[107] State v. Retail Gasoline Dealers Ass'n, Inc., 256 Wis. 537, 41 N.W.2d 637 (1950).

laws should be enforced, that a state antitrust statute should vest general equity power — both prohibitory and mandatory — in state courts to prevent and restrain antitrust violations.[108] Although dissolution of domestic corporations may be accomplished under state charter forfeiture provisions and, to a limited degree, a form of dissolution may be achieved by ouster of foreign corporations under state license forfeiture provisions, affirmative equitable relief in the form of dissolution, divestiture, or divorcement is difficult to achieve without a grant of full equity powers under state antitrust laws. Since equity jurisdiction provides the primary remedial devices used to remove anticompetitive restraints and to prevent future violations of antitrust prohibitions by proven violators, a clear-cut grant of general equity power is essential to a workable state antitrust statute.

III. Preliminary Injunctive Relief in Public Enforcement

A. Federal Enforcement

Section 4 of the Sherman Act[109] and section 15 of the Clayton Act,[110] which empower the Attorney General to seek equitable relief for violations of the antitrust laws, also authorize courts to "make such temporary restraining order or prohibition as shall be deemed just in the premises"[111] pending a final determination of the case. Thus, the United States district courts are empowered to issue temporary restraining orders and preliminary injunctions at the instance of the Attorney General to aid in enforcing the antitrust laws.

The general facts and circumstances which will persuade a court to exercise this discretionary power in antitrust cases have closely paralleled those in general equity practice. A temporary restraining order, which seems to be seldom sought or granted, is only issued where the "mischief . . . [presents] serious, imminent, and irremediable" harm and time does not permit the giving of notice to the defendant.[112] Many courts require that the government show a prima facie case of violation and irreparable harm before they will grant a preliminary injunction.[113] Other courts have applied noticeably less stringent standards for preliminary injunctive relief, usually requiring that

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[108] *See generally* State v. Milwaukee Braves, Inc., 1966 Trade Cas. ¶ 71,738 (Wis. Cir. Ct., Milwaukee County), *Rev'd on other grounds*, 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966). The tentative draft of the Uniform State Antitrust Law (Legislative Research Center, University of Michigan Law School) vests general equity jurisdiction in state courts to issue mandatory and prohibitory injunctions and temporary restraining orders. The proposed Uniform Draft does not mention preliminary injunctions. Tentative Draft of Uniform State Antitrust Act § 14, 4 Trade Reg. Rep. ¶ 30,101, at 35,155 (1965).

[109] 15 U.S.C. § 4 (1964).

[110] 15 U.S.C. § 25 (1964). Considerable dispute has arisen over the use of preliminary injunctive relief in the enforcement of § 7 of the Clayton Act. For an analysis see Note, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N.Y.U.L. Rev. 771 (1965).

[111] 15 U.S.C. §§ 14, 25 (1964).

[112] United States v. Coal Dealers' Ass'n, 85 F. 252, 259 (C.C.N.D. Cal. 1898).

[113] *See, e.g.*, United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965); United States v. Schine Chain Theatres, Inc., 31 F. Supp. 270 (W.D.N.Y. 1940). *Contra*, United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965).

"the balance of hardships tips decidedly toward the plaintiff"[114] and that the plaintiff raise serious questions of law and fact on the merits of the ultimate issue.[115] The existence of disputed issues of law or fact does not, in itself, bar preliminary relief, nor need the plaintiff show a right to final relief in order to obtain a preliminary injunction.[116]

Some courts, however, have held that the right to ultimate relief in the form of divestiture precludes the issuance of a temporary restraining order in merger cases.[117] Conditioning preliminary relief upon possible ultimate relief seems to be done with little thought of the difficulty of unscrambling scrambled eggs[118] or the damage which may be done to the merged company in the interim.[119]

A preliminary injunction may not be staved off by submitting an ex parte stipulation over the government's objection, since such a maneuver would have all the effects of a preliminary injunction but would not be based on a hearing with finding of facts and law.[120] The hearing is usually conducted on the basis of affidavits submitted by the parties. The government's affidavits in support of the motion for preliminary injunction must indicate a reasonable probability of success after full litigation; an affidavit by a government attorney or economist based on something less than expertise in the particular industry involved is not accorded much weight by some courts.[121]

The purpose of preliminary injunctive relief has often been stated to be the preservation of the status quo, the prevention of irreparable harm, or the protection of the court's jurisdiction. But the preliminary injunction may not be used in place of other traditional remedies. For example, in *De Beers Consolidated Mines, Ltd. v. United States*,[122] the Supreme Court struck down the use of the preliminary injunction as a substitute for a writ of attachment. De Beers was charged with monopolization and restraint of trade in the gem and

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[114] Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

[115] United States v. Aluminum Co. of America, 247 F. Supp. 308 (E.D. Mo. 1962), *aff'd*, 382 U.S. 12 (1965).

[116] *Id.*

[117] *See, e.g.*, United States v. Von's Grocery Co., 1960 Trade Cas. ¶ 69,698 (S.D. Cal.); *see* United States v. Continental Can Co., 1956 Trade Cas. ¶ 68,479 (S.D.N.Y.).

[118] A United States district court judge for the District of Utah had to clear his docket for five months to handle the divestiture ordered by the Supreme Court in United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). The divestiture did not re-establish a company of the same competetive strength as existed before the merger. *See* N.Y. Times, § 3, at 1, col. 1 (May 23, 1965); N.Y. Times, at 65, col. 5 (May 25, 1965). The Supreme Court reversed the lower court decree at the instance of intervenors for failure of the lower court to fulfill the Supreme Court's original mandate. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967). The parties are presently engaged in the complicated task of attempting to restore to its original competitive strength and independence a company that was merged several years ago.

[119] Loss of plants, business opportunities, skilled personnel, goodwill, and established business relationships are some of the types of irreparable harm which may occur to the corporation submerged by a merger unless strong preliminary injunctive relief is granted. *See* United States v. Aluminium Ltd., 1965 Trade Cas. ¶ 71,366 (D.N.J.); United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964).

[120] United States v. Columbia Steel Co., 71 F. Supp. 734 (D. Del. 1947).

[121] *See, e.g.*, United States v. Gimbel Bros., Inc., 202 F. Supp. 779 (E.D. Wis. 1962); United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68,244 (E.D. Mo.).

[122] 325 U.S. 212 (1945).

industrial diamond industry; the district court, on the theory of securing the performance of any future orders the court might make, issued a preliminary injunction to enjoin the transfer of bank accounts held by the defendant foreign corporations in United States banks.[123] The Supreme Court held that the federal courts have jurisdiction "to restrain action or conduct violative of the statute" in the "same character as that which may be granted finally," concerning matters related to the lawsuit. But using the preliminary injunction "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt" was held to be beyond the equity jurisdiction of a court.[124]

In addition to requiring a reasonable probability of success upon a full hearing, a court must also weigh the relative injury to the parties,[125] except perhaps in merger cases under section 7 of the Clayton Act. In the latter case it has been suggested that the government need not show injury to the public in order to obtain preliminary or final injunctive relief.[126]

Merger cases under section 7 of the Clayton Act, the type of case in which preliminary injunctive relief is most commonly sought, illustrate well the balancing-of-hardships process that a court must engage in when formulating a preliminary injunction.[127] On the defendant's side of the case the courts usually weigh the effects of restricting an individual's property rights in the stock or assets acquired; the loss of time and the expense already invested in the planning and execution of the merger; the loss caused by timing the merger to meet certain stock market conditions; whatever competitive advantages may reside in the merger; the fact that the government is not required to post an indemnity bond; and the general factor that the defendant's freedom of action is being restrained without a full hearing on the merits.[128] On the government's

[123] United States v. De Beers Consol. Mines, Ltd., 1945 Trade Cas. ¶ 57,354 (S.D.N.Y.), *rev'd*, 325 U.S. 212 (1945).

[124] De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945).

[125] *See* Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); United States v. Aluminum Co. of America, 247 F. Supp. 308 (E.D. Mo. 1962), *aff'd*, 382 U.S. 12 (1965).

[126] In United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68,244 (E.D. Mo.), the court stated:

> One exception to the rule is that in a case . . . where the Government is party plaintiff, if by acquiring stock by one corporation in another corporation, in any line of interstate commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly, plaintiff would not have to show hardship to any segment of the public. It is patent on the face of Section 7 that its purpose is to bar mergers which tend to lessen competition or tend to create a monopoly before they ripen into actuality. Consequently hardship . . . is not and cannot be a part of the Government's burden.

Id. at 71,114 (footnote omitted).

[127] Preliminary injunctions have also been used to preserve and protect a court's jurisdiction over a case before it. *See, e.g.*, United States v. Western Pa. Sand & Gravel Ass'n, 114 F. Supp. 158 (W.D. Pa. 1953) (preliminary injunction subject to a show cause order for contempt of consent decree). *But see* De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); United States v. Wallace & Tiernan Co., 1954 Trade Cas. ¶ 67,659 (D.R.I. 1953) (court refused relief on the grounds that dissolution had occurred in fact).

[128] *See generally* United States v. Phillips Petroleum Co., 1966 Trade Cas. ¶ 71,872 (S.D. Cal.); United States v. FMC Corp., 218 F. Supp. 817 (N.D. Cal.), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963). The courts may also be concerned with the adverse effect of a preliminary injunction upon third parties. *See* United States v. West Va. Pulp & Paper Co., 1965 Trade Cas. ¶ 71,452 (S.D.N.Y.).

side are weighed the anticompetitive effects of the merger; the obvious difficulty of divestiture; and the debilitating effect of the merger upon the good will, business relationships, employee morale, and financial standing of the merged company.[129]

On occasion, the preliminary injunction has been used to do far more than merely protect the status quo. In *United States v. Aluminum Co. of America*,[130] an action to enjoin a violation of section 7 of the Clayton Act by Alcoa's acquisition of Cupples Products Corporation,[131] the court issued a preliminary injunction which (1) prohibited further consolidation; (2) required that the corporate names be kept separate and distinct; (3) required the corporations to maintain separate pension plans and sale organizations; (4) prohibited either corporation from hiring the employees of the other; (5) prohibited Alcoa from selling or encumbering any of the Cupples stock; and (6) required Cupples, pending final determination of the case, to operate a fabrication plant conceived by it, but built by Alcoa in Alcoa's own name subsequent to the stock acquisition. While the preliminary injunction was designed to protect the merged company from destruction as a competitor, it also insured that any future court order of divestituture could be carried out. As the Alcoa litigation shows, it is often necessary to go beyond preservation of the status quo in order to protect the merged company from being drained of personnel, assets, and good will between the filing of the complaint and the ultimate termination of the litigation.

The initial stages of the *Brown Shoe* merger case[132] illustrate how a carefully drawn preliminary injunctive decree can obtain these objectives while mitigating damage to the defendants. Upon motion for a preliminary injunction, the district court struck a balance between allowing consummation of the merger and postponing it indefinitely.[133] On the one hand, the court was faced with the prospect of being unable to unravel the merger if a violation were found, while on the other, account had to be taken of important business considerations — particularly stock market conditions — which would make delay of the merger damaging to the defendant if it were enjoined by preliminary injunction and a finding of no violation were later made. The court resolved its Solomon's choice by permitting consummation of the merger in form and on paper, but not in substance. This was accomplished by dissolving a tem-

[129] *See generally* United States v. Standard Oil Co. (N.J.), 1965 Trade Cas. ¶ 71,503 (D.N.J.); United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964). These factors have also had substantial effect in influencing federal courts to issue preliminary injunctions at the instance of private litigants. *See* Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962). Another factor often stressed in granting motions for preliminary injunctions in private cases is the prevention of the destruction of the moving party's business. *See, e.g.*, Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964). *But see* House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962), *rev'g* P.W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961).

[130] 247 F. Supp. 308 (E.D. Mo. 1962), *aff'd*, 382 U.S. 12 (1965).

[131] The acquisition, a move by Alcoa to intergrate forward into the aluminum fabrication of doors and windows, was subsequently found to violate § 7 of the Clayton Act. United States v. Aluminum Co. of America, 1964 Trade Cas. ¶ 71,243 (E.D. Mo.).

[132] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[133] 1956 Trade Cas. ¶ 68,244 (E.D. Mo.).

porary restraining order against a planned merger vote by the stockholders of Brown and Kinney and by issuing a preliminary injunction requiring that (1) Kinney assets be vested in a Brown subsidiary; (2) the subsidiary have independence and no directors in common with Brown; (3) Kinney's after-merger acquired assets and profits be kept separate and be retained by Kinney; (4) Brown retain the Kinney stock and not encumber it; (5) all of Kinney's leases on retail shoe outlets be renewed in Kinney's name; (6) none of Kinney's retail outlets in competition with those of Brown outlets be closed; (7) none of Kinney's factories be taken over by Brown; and, (8) upon formation of the Kinney subsidiary by Brown, the subsidiary submit to the court's jurisdiction.

Thus, in the *Alcoa* and *Brown Shoe* cases, the courts not only balanced the equities in determining whether a preliminary injunction should issue, but also designed the injunction itself so as to minimize imbalance. These cases also illustrate the necessity for preliminary injunctive relief not only to preserve the status quo but to establish conditions which will facilitate any ultimate orders necessary after full litigation and to insure that the sum of the parts subsequent to divestiture equals the sum of the competitive parts prior to merger.[134]

B. State Enforcement

A few state antitrust statutes expressly authorize preliminary injunctive relief at the request of state officials[135] and the breadth of the grant of equity jurisdiction in the antitrust laws of other states seems broad enough to include the power to issue preliminary injunctions.[136] The general failure of state officials to enforce state antitrust laws has resulted, of course, in judicial development of the standards to be applied when public officials request preliminary injunctive relief. In the few state court cases in which preliminary injunctive relief has been sought, it has usually been in the form of a request for the appointment of a receiver pending quo warranto or ouster proceedings[137] or the seeking of an injunction against labor union activity threatening immediate or irreparable harm.[138]

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[134] The court may be required to oversee defendant compliance with the preliminary injunction, since business considerations may dictate that substantial action be taken with regard to the assets of the merged firm. *See* United States v. Aluminium Ltd., 1966 Trade Cas. ¶ 71, 867 (D.N.J.).

[135] *See* COLO. REV. STAT. ANN. § 55-4-5 (1963); IDAHO CODE ANN. § 48-112 (1947); LA. REV. STAT. ANN. § 13:5088 (1951); MINN. STAT. ANN. § 325.81(2) (1966); MO. ANN. STAT. § 416.260(2) (1952); NEB. REV. STAT. § 59-819 (1960); N.D. CENT. CODE § 51-08-11 (1960); OHIO REV. CODE ANN. § 1331.11 (Page 1962); OKLA. STAT. ANN. tit. 79, § 22 (1965); WIS. STAT. ANN. § 133-02 (1957), *as amended*, Supp. (1967).

[136] *See, e.g.*, CAL. BUS. & PROF. CODE § 16754.5 (West 1964); HAWAII REV. LAWS § 205A-13 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 93, § 3 (1954); N.Y. GEN. BUS. LAW § 342 (McKinney 1957); S.D. CODE § 13.1808 (1939); WASH. REV. CODE ANN. § 19.86.080 (Supp. 1966). It has been held that temporary or preliminary injunctive relief is not available under the Mississippi antitrust laws. Harvey v. State *ex rel.* Knox, 149 Miss. 874, 116 So. 98 (1928).

[137] *See, e.g.*, State v. American Sugar Ref. Co., 138 La. 1005, 71 So. 137, 139 (1916); State *ex rel.* Hamilton v. Standard Oil Co., 176 Wash. 251, 28 P.2d 790 (1934).

[138] *See, e.g.*, Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); State v. Milk Handler's & Processors Ass'n, Inc., 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 71,969 (N.Y. Sup. Ct. Jan. 6, 1967).

The standards applied seem generally to follow those established for the granting of preliminary injunctive relief in federal antitrust cases: (1) the grant or denial of preliminary relief is largely in the discretion of the trial court; (2) preliminary relief is not readily granted and when it is granted it is usually done to maintain the "status quo" or to prevent immediate or irreparable harm; (3) the state must make out a prima facie case of violation or show a reasonable probability of success upon full litigation; and, (4) the court will balance the relative hardships to the parties in deciding whether preliminary injunctive relief should issue.[139]

The need for including preliminary injunctive relief in state antitrust laws is difficult to illustrate absent concrete evidence of the types of cases state officials may be expected to encounter. However, federal experience with essentially local restraints of trade[140] seems to indicate that state courts handling local restraints of trade will need such power and that the judiciary may be expected to proceed with caution where preliminary equitable relief is sought. Although preliminary injunctive relief seems to be used most often in merger cases — which state antitrust enforcement may not often encounter[141] — it seems reasonable to insure that the weapon is available to prevent immediate and irreparable harm, to maintain the status quo, or to insure that any final order the court may make will not be frustrated by events occurring while the litigation is pending.

IV. PRIVATE ENFORCEMENT AND INJUNCTIVE RELIEF

A. Permanent Injunctive Relief

Section 16 of the Clayton Act authorizes "[a]ny person, firm, corporation, or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[142] Prior to the passage of the Clayton Act, no private injunctive relief under the Sherman Act was available to persons injured by Sherman Act violations.[143]

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[139] *See* cases cited notes 136–37 *supra*; State v. Milwaukee Braves, Inc., 1966 Trade Cas. ¶ 71,738 (Wis. Cir. Ct., Milwaukee County), *rev'd on other grounds*, 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966).

[140] *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 254–312 (1964); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236.

[141] *See generally* J. FLYNN, *supra* note 140, at 201–52. There have been cases under state antitrust laws where mergers have been attacked. *See, e.g.*, Peoples Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960). The tentative draft of a proposed Uniform State Antitrust Law does not include a section comparable to § 7 of the Clayton Act. *See* Tentative Draft of Proposed Uniform State Antitrust Act, 4 TRADE REG. REP. ¶ 30,101 (1965).

[142] 15 U.S.C. § 26 (1964).

[143] Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917). In De Koven v. Lake Shore & M.S. Ry., 216 F. 955, 957 (S.D.N.Y. 1914), however, the court upheld the right of a minority shareholder to bring an action in equity for Sherman Act violations on the theory that a stockholder's derivative suit to enjoin ultra vires acts by a corporation exists independent of the Sherman Act. In a subsequent phase of this litigation, Continental Sec. Co. v. Michigan Cent. R.R., 16 F.2d 378, 379 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927), the Sixth Circuit Court of Appeals held that § 16 of the Clayton Act did not authorize affirmative equitable relief in the form of dissolution. *See generally* Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964).

The right to private injunctive relief under section 16 of the Clayton Act is phrased in slightly different language than the right to public injunctive relief granted by section 4 of the Sherman Act[144] and section 15 of the Clayton Act.[145] In section 15 the United States is granted the power to "institute proceedings in equity to prevent and restrain . . . violations . . . . by way of [a] petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited."[146] A private person is "entitled to sue for . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . under the rules governing such proceedings."[147] The statutory right of private injunctive relief is phased in prospective terms; it is to be used to protect private plaintiffs against future conduct threatening them with loss or damage. The statutory language seems to indicate that Congress intended to limit private injunctive relief to the correction of conditions which pose future dangers for the particular private plaintiff rather than to empower private litigants to correct public wrongs. This interpretation of section 16 of the Clayton Act has led some courts to hold that private injunctive relief is not as broad in scope as public injunctive relief since the Act only authorizes negative and not affirmative injunctive relief.[148] It has been convincingly argued[149] that this interpretation of section 16 of the Clayton Act is erroneous, particularly since the right of the federal government to affirmative injunctive relief under the negative language of section 4 of the Sherman Act and section 15 of the Clayton Act has long been recognized.[150]

Only a few state antitrust laws expressly authorize private injunctive relief,[151] although many state courts have granted equitable relief for state antitrust law violations at the instance of private suitors[152] because of the inade-

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[144] 15 U.S.C. § 4 (1964).

[145] 15 U.S.C. § 25 (1964).

[146] *Id.*

[147] 15 U.S.C. § 26 (1964).

[148] *See, e.g.*, Fein v. Security Banknote Co., 157 F. Supp. 146 (S.D.N.Y. 1957); Westor Theatres, Inc. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757, 763 (D.N.J. 1941).

[149] Note, *supra* note 143, at 277–81.

[150] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Court observed that the purpose of the equity remedy in antitrust cases is "[t]o forbid the doing in the future of acts like those which . . . have been done in the past which would be violative of the statute . . . and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." *Id.* at 78. The most common types of affirmative injunctive relief requested are dissolution and divestiture. For excellent studies of these remedies see Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 COLUM. L. REV. 1192 (1963); Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147 (1950); Comment, *Aspects of Divestiture as an Antitrust Remedy*, 32 FORDHAM L. REV. 135 (1963).

[151] HAWAII REV. LAWS, § 205A-11(1)(b) (Supp. 1965); LA. REV. STAT. ANN. § 51:129 (1965); VA. CODE ANN. § 59-32 (1950); WASH. REV. CODE ANN. § 19.86.090 (1961).

[152] *See* cases cited note 17 *supra.*

quacy of the remedy at law,[153] irreparable harm,[154] multiplicity of lawsuits,[155] unascertainable damages,[156] or because a malicious interference with contractual or property rights was threatened.[157] Apart from serving as a defense in debt and contract cases, state antitrust statutes seem to have been most widely used by private parties seeking injunctive relief against conduct violative of state antitrust policy.

At the federal level the standard to be applied in determining whether injunctive relief is warranted generally includes three elements. The plaintiff must (1) prove a violation of the antitrust laws (2) injuring the public (3) which results in special injury to the plaintiff.[158] The crucial problems for private litigants are, of course, proving the antitrust violation and demonstrating how the conduct threatens loss or damage to the plaintiff. The task of proving a violation is usually a major difficulty because the cost and complexities normally attendant to litigating most antitrust cases are particularly onerous for the inexperienced private litigant with limited resources. The problem of demonstrating special injury to the particular plaintiff by the antitrust violation is crucial because the "statute does not vest in a private litigant the right to redress a public wrong,"[159] and the proof of a nexus between an antitrust violation which injures the public and injury to a particular plaintiff is a difficult evidentiary hurdle.[160] It has been held, however, that when a plaintiff

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[153] *See, e.g.*, Tallassee Oil & Fertilizer Co. v. Holloway, 200 Ala. 492, 76 So. 434 (1917); Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438, 440 (1940) (Pennsylvania has no general antitrust law).

[154] *See, e.g.*, Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297, 300 (1948); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951).

[155] *See, e.g.*, Kold Kist, Inc. v. Meat Cutters Local 421, 99 Cal. App. 191, 221 P.2d 724 (1950); Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940).

[156] *See, e.g.*, Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902).

[157] *See, e.g.*, Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353 (1905); Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894).

[158] Shotkin v. General Elec. Co., 171 F.2d 236 (10th Cir. 1948); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 330–31 (N.D. Ill. 1948).

[159] Dollac Corp. v. Margon Corp., 164 F. Supp. 41, 65 (D.N.J. 1958), *aff'd on other grounds*, 275 F.2d 202 (3d Cir. 1960); *accord*, Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325 (N.D. Ill. 1948); *see* Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., 1966 Trade Cas. ¶ 71,678, at 82,066 (S.D.N.Y.).

[160] *Compare* Gottesman v. General Motors Corp., 221 F. Supp. 488, 493 (S.D.N.Y. 1963), *cert. denied*, 379 U.S. 882 (1964), *with* Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965). Causation is also difficult to prove in treble damage cases. *See generally* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U.L. REV. 691 (1963); Comment, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV 130 (1950). Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1964), assists private parties in proving violation and public parties in proving violation and public injury but does not affect the plaintiff's burden of proving special injury to himself. In private injunction cases there has been little reliance upon § 5(a) of the Clayton Act, presumably because the government's prior suit often includes the type of relief a private party would be able to receive. The public relief presumably results in effecting relief against future injury and damages for the would-be private litigant contemplating an action in equity. The continuing attempts by private parties to intervene in government cases, however, might indicate that many individuals threatened with loss or damage in the future do not believe a government action in equity will rectify the violation and prevent future harm to them. The general hostility of the courts to intervention in government-prosecuted antitrust cases has resulted in an expansion of amicus briefs, which can have considerable

shows a "dangerous probability" of injury to himself, injunctive relief under section 16 of the Clayton Act is available.[161]

Injury to the public is presumed in cases of per se violations even when the "victim is just one merchant whose business is so small that his destruction makes little difference to the economy."[162] Private injuries, however, without presumed or proven injury to the public, are not actionable.[163] To state a claim upon which relief can be granted, "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires."[164]

Although the courts have broadly interpreted the language "any person, firm, corporation, or association"[165] and have been willing to give broad injunctive relief to private antitrust plaintiffs, [166] private injunctive relief has been limited by two tendencies in the judicial administration of the antitrust laws: first, "any person" has not been widely interpreted where a stockholder has sought injunctive relief for an antitrust violation injuring his corporation; second, the courts have been reluctant to grant affirmative injunctive relief because of the seemingly negative language of section 16 of the Clayton Act.

A shareholder's derivative action[167] has remedial potential in the areas of preventing corporate conduct which would invite grave antitrust risks and penalties,[168] in coercing reluctant corporate management to recover treble damages or to obtain injunctive relief against threatened damage to the corporation by others,[169] and in recovering damages from officers and directors for

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impact. *See* Note, *An Experiment in Preventive Anti-Trust: Judicial Regulation of the Motion Picture Exhibition Market under the Paramount Decrees*, 74 YALE L.J. 1041 (1965). *See also* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

[161] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927).

[162] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (footnotes omitted).

[163] *See, e.g.*, Shotkin v. General Elec. Co., 171 F.2d 236 (10th Cir. 1948).

[164] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961).

[165] *See, e.g.*, Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1945) (a state may sue under the antitrust laws in its capacity as parens patriae or proprietor).

[166] *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963) (injunction against Exchange action which denied plaintiff stock market wire service); Columbia River Packers Ass'n, Inc. v. Hinton, 315 U.S. 143 (1942) (enjoining monopolization and price fixing in Washington, Oregon, and Alaska fish market); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (injunction against national secondary boycott); Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281 (6th Cir. 1964) (injunction against enforcement of trade association bylaw); Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520 (7th Cir.), *cert. denied*, 332 U.S. 817 (1947) (regulation of first-run motion picture allocation among competing theatres); Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966) (enjoining bid rigging scheme).

[167] *See generally* Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143 (1961); Comment, *Federal Antitrust Law — Stockholder's Remedies for Corporate Injury Resulting from Antitrust Violations: Derivative Antitrust Suit and Fiduciary Duty Action*, 59 MICH L. REV. 904 (1961); Note, *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480 (1953).

[168] *See, e.g.*, Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957); Brill v. General Indus. Enterprises, Inc., 234 F.2d 465 (3d Cir. 1956); Ramsburg v. American Inv. Co., 231 F.2d 333 (7th Cir. 1956); Gomberg v. Midvale Co., 157 F. Supp. 132 (E.D. Pa. 1955).

[169] *See, e.g.*, United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Rogers v. American Can Co., 187 F. Supp. 532 (D.N.J. 1960), *aff'd*, 305 F.2d 297 (1962).

injury to the corporation because of damages, penalties, or other loss caused by management violations of the antitrust laws.[170] The effectiveness of the sanction is especially appealing since the primary thrust of derivative actions is to hold management responsible for its actions or failure to act. The imposition of the difficulties and complexities of derivative actions[171] upon an already complicated type of litigation — the antitrust suit — however, has resulted in judicial reluctance to fulfill the potentialities of the shareholders' derivative action as an effective remedy in antitrust enforcement.[172] Judicial reaction to stockholder attempts to enforce the antitrust laws in derivative suits seems to indicate that the wedding of private antitrust litigation and stockholder derivative suits is not favored. For example, stockholder attempts to enforce the corporation's antitrust remedies long stumbled over two Supreme Court cases which built an effective barricade against such suits. In *Fleitmann v. Welsbach Street Lighting Co.*,[173] the Court held, per Justice Holmes, that a derivative bill in equity for treble damages was not available to a stockholder who claimed that the defendant's control was destroying the corporation in violation of the antitrust laws, since the equity bill would deny the defendant his constitutional right to jury trial.[174] In *United Copper Securities Co. v. Amalgamated Copper Co.*,[175] the Court held that a stockholder's derivative suit is purely equitable. The rule of these cases has been described as "absurdly simple." "A stockholder's derivative suit cannot be brought at law, for it is an equitable action; it cannot be brought in equity because it would take away the right of jury trial."[176] These cases did not bar the right to equitable relief, however, and more modern cases have indicated that the procedural difficulties raised by the *Fleitmann* and *United Copper Securities Company* cases in treble damage actions can be overcome by the flexibility of the Federal Rules of Civil Procedure.[177]

The role that stockholder derivative actions have in antitrust enforcement, however, still remains unclear. The need for managerial freedom to make decisions and act without fear of astronomical antitrust liability must be balanced against the strong public policy favoring enforcement of the antitrust

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[170] *See, e.g.*, Clayton v. Farish, 191 Misc. 136, 73 N.Y.S.2d 727 (Sup. Ct. 1947); Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 38 N.Y.S.2d 270, 273 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944).

[171] The most common difficulty is the strike suit, which in turn has resulted in a careful hedging in of the standards for derivative actions to prevent abuses. *See generally* Ballantine, *Abuses of Shareholder's Derivative Suits: How Far Is California's New "Security for Expenses" Act Sound Regulation?*, 37 CALIF. L. REV. 399 (1949).

[172] For an excellent analysis of the interrelationship of derivative actions and private antitrust enforcement see Blake, *supra* note 167.

[173] 240 U.S. 27 (1916).

[174] This difficulty, in part, may be overcome by severing the "legal" issues from the "equitable" and holding a jury trial on the former. *See* Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953); Columbia River Packers Ass'n, Inc. v. Hinton, 34 F. Supp. 970 (D. Ore. 1939), *rev'd on other grounds*, 117 F.2d 310 (9th Cir. 1941), *rev'd*, 315 U.S. 143 (1942).

[175] 244 U.S. 261 (1917).

[176] Note, *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480, 485 (1953).

[177] *See, e.g.*, Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953). *But see* International Rys. v. United Fruit Co., 373 F.2d 408 (2d Cir. 1967).

laws and the need to curb the general trend of managerial independence as ownership of large corporations tends to become more dispersed. Such a balancing process would seem to demand that stockholders be permitted and encouraged to bring suit in situations in which managerial activity amounts to intentional violations of antitrust policy injuring the corporaton, predatory conduct resulting in antitrust liability, and conduct which clearly violates antitrust policy or is a clear-cut case of managerial refusal to exercise corporate rights under the antitrust laws without a compensating factor of legitimate business gains to be expected from refraining. Otherwise, deference should be paid to the business judgment of management, lest competition become dulled by managerial timidity in the face of astronomical antitrust liability.

The second limitation upon private injunctive relief under section 16 of the Clayton Act, that only negative relief against future violations threatening loss or damage will be granted, is based upon the language of the section. As mentioned earlier, this limitation upon the scope of private injunctive relief seems unwarranted.[178] With the judicial evolution of section 7 of the Clayton Act and increased emphasis upon the prevention of mergers which tend to lessen competition, private litigation to enforce section 7 may be expected to increase substantially.[179] And, as the Supreme Court suggested in *United States v. E.I. du Pont de Nemours & Co.*,[180] affirmative injunctive relief in the form of divestiture should "always be in the forefront of a court's mind when a violation of § 7 has been found."[181] Consequently, plaintiffs in private suits for injunctive relief against violations of section 7 of the Clayton Act have sought divestiture as the ultimate relief for the alleged violation.[182] When affirmative injunctive relief is necessary to protect a private plaintiff from future loss or damage from violation of the antitrust laws, courts should normally grant such relief at the instance of a private litigant.[183]

At the state level there have been several reported cases of private litigants seeking permanent injunctive relief for antitrust violations.[184] Private injunctive relief has been utilized to enjoin monopolization threatening the destruction of a plaintiff's business;[185] to enjoin concerted refusals to deal;[186] to end

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[178] Note, *supra* note 143.

[179] In Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965), the court rejected a contention that private parties could not sue under § 7 because the incipiency test of § 7 precluded the possibility of harm to the private plaintiff.

[180] 366 U.S. 316 (1961).

[181] *Id.* at 331.

[182] *See, e.g.*, Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962).

[183] *See* Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *cf.* Peoples Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777, 799 (1960).

[184] *See* cases cited note 17 *supra.*

[185] *See, e.g.*, Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 (1930); Group Health Co-op. v. Kings County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1952).

[186] *See, e.g.*, Alfred M. Lewis, Inc. v. Teamsters Local 542, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902).

tie-ins restraining trade;[187] to terminate group boycotts;[188] to enjoin stock and asset acquisitions restraining trade and damaging minority shareholders;[189] to restrain price-fixing schemes damaging a plaintiff;[190] to enjoin misuse of a patent monopoly in violation of state antitrust laws;[191] and to terminate secondary boycotts.[192] While many of the cases are relatively old, they reflect the same factors which necessitate private injunctive relief under the federal antitrust laws. Injunctive relief is used primarily when predatory practices threaten destruction of a plaintiff's business[193] and when stock acquisitions with the ultimate purpose of absorbing the company whose stock is being acquired threaten the independent existence of a stockholder's or management's corporation.[194] Many antitrust injunctions at the state level have also been sought to enjoin labor union activity allegedly threatening irreparable harm to the plaintiff.[195]

The standards for invoking the assistance of a court of equity in private cases under state antitrust laws seem to be substantially the same as those applied in private injunctive cases under the federal antitrust laws. The plaintiff must prove an antitrust violation injuring the public and show special injury

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[187] *See, e.g.*, Blackmon v. Gulf Life Ins. Co., 179 Ga. 343, 175 S.E. 798 (1934).

[188] *See, e.g.*, Pirnie Simons & Co. v. Whitney, 144 Misc. 812, 259 N.Y.S. 193 (Sup. Ct. 1932); Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A. 2d 438 (1950) (injunction issued on common law theory; Pennsylvania has no general antitrust law).

[189] *See, e.g.*, Dunbar v. American Tel. & Tel. Co., 238 Ill. 456, 87 N.E. 521 (1909); Harding v. American Glucose Co., 182 Ill. 551, 55 N.E. 577 (1899), *appeal dismissed*, 187 U.S. 651 (1902); *cf.* Peoples Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960).

[190] *See, e.g.*, Fort Wayne Cleaners & Dyers Ass'n, Inc. v. Price, 127 Ind. App. 13, 137 N.E.2d 738 (1956); Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N.E. 823 (1909).

[191] *See, e.g.*, Straight Side Basket Corp. v. Webster Basket Co., 4 F. Supp. 644 (W.D.N.Y. 1933). *See also* Straus v. American Publishers' Ass'n, 231 U.S. 222 (1913) (enjoining abuse of federal copyright laws in violation of the New York antitrust law).

[192] *See, e.g.*, Ridge Mfg. Co. v. Elec. Workers Local 735, 36 Ohio Op. 206, 77 N.E.2d 248 (C.P. Cuyahoga County 1947); Turner v. Zanes, 206 S.W.2d 144 (Tex. Civ. App. 1947).

[193] *Compare* Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 (1930), *and* Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902), *with* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[194] *Compare* Dunbar v. American Tel. & Tel. Co., 238 Ill. 456, 87 N.E. 521 (1909), *and* Harding v. American Glucose Co., 182 Ill. 551, 55 N.E. 577 (1899), *appeal dismissed*, 187 U.S. 651 (1902), *with* Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953), *and* American Crystal Sugar Co. v. Cuban-American Sugar Co., 143 F. Supp. 100 (S.D.N.Y. 1956).

[195] *See, e.g., Fed.*: Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); *Cal.*: Alfred M. Lewis, Inc. v. Teamsters Local 54, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Idaho*: Robison v. Hotel Employees Local 782, 35 Ida. 418, 207 P. 132 (1922); *Mass.*: Folsom v. Lewis, 208 Mass. 336, 94 N.E. 316 (1911); *Minn.*: Campbell v. Motion Picture Mach. Operators Local 219, 151 Minn. 220, 186 N.W. 781 (1922); *Mo.*: Adams Dairy, Inc. v. Burke, 293 S.W.2d 281 (Mo. 1956), *cert. denied*, 352 U.S. 969 (1957); *N.J.*: Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894); *N.Y.*: Falciglia v. Gallagher, 164 Misc. 838, 299 N.Y.S. 890 (Sup. Ct. 1937); *Ohio*: Ridge Mfg. Co. v. Elec. Workers Local 735, 36 Ohio Op. 206, 77 N.E.2d 248 (C.P. Cuyahoga County 1947); *Pa.*: Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940); *Texas*: Turner v. Zanes, 206 S.W.2d 144 (Tex. Civ. App. 1947).

to himself.[196] The element of public injury does not seem to be required in many states where the state antitrust law does not expressly provide for injunctive relief, and the courts have upheld the right of private parties to seek injunctive relief on traditional equity grounds. When the plaintiff is able to demonstrate an inadequate remedy at law,[197] irreparable harm,[198] the impossibility of ascertaining damages,[199] or the multiplicity of lawsuits,[200] state courts do not dwell on the necessity of showing public as well as private injury. In effect then, private injunctive relief to restrain antitrust violations is looked upon not as supplemental enforcement of public policy by private individuals given standing to sue because of their special injury, but as a private action in equity to restrain injurious conduct traditionally within the framework of equitable cognizance.[201] Thus, when a private litigant may have difficulty proving injury to the public, one of the elements necessary to invoke private injunctive relief under section 16 of the Clayton Act, consideration should be given the possibility of bringing the case in a state court under general common law equity principles.

A few state cases have dealt with the question of antitrust derivative actions by shareholders. For example, in *Di Tomasso v. Loverro*[202] a New York court enjoined performance of a corporation's contract in violation of the Donnelly Act[203] and awarded damages against the directors at the instance of a minority stockholder. In *Anderson v. Shawnee Compress Co.*,[204] at the instance of minority stockholders of Shawnee, the Oklahoma courts restrained the leasing of the assets of the Shawnee Compress Company to a corporation attempting to monopolize the cotton compressing business. In each of these cases there is little analysis of the derivative suit or of its interrelationship with the enforcement of state antitrust laws. Little judicial development of the problem seems to have taken place generally.[205]

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[196] *See, e.g.*, Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951).

[197] *See, e.g.*, Tallassee Oil & Fertilizer Co. v. Holloway, 200 Ala. 492, 76 So. 434 (1917); Sultan v. Star Co., 106 Misc. 43, 174 N.Y.S. 52 (Sup. Ct. 1919).

[198] *See, e.g.*, Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178 (1930); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951).

[199] *See, e.g.*, Kold Kist, Inc. v. Meat Cutters Local 421, 99 Cal. App. 2d 191, 221 P.2d 724 (1950); Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902).

[200] *See, e.g.*, Blackmon v. Gulf Life Ins. Co., 179 Ga. 343, 175 S.E. 798 (1934); Schwartz v. Laundry & Linen Supply Drivers Local 187, 339 Pa. 353, 14 A.2d 438 (1940).

[201] For example, in some state cases involving antitrust violations, private injunctive relief has been granted upon the traditional theories of preventing malicious interference with contractual and property rights, *see, e.g.*, Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353 (1905); Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894), or preventing the dilution of a stockholder's voting rights, Dunbar v. American Tel. & Tel. Co., 238 Ill. 456, 87 N.E. 521 (1909).

[202] 250 App. Div. 206, 293 N.Y.S. 912, *aff'd per curiam*, 276 N.Y. 551, 12 N.E.2d 570 (1937).

[203] N.Y. GEN. BUS. LAW § 340 (McKinney 1957).

[204] 17 Okla. 231, 87 P. 315 (1906), *aff'd*, 209 U.S. 423 (1908).

[205] *See also* Dunbar v. American Tel. & Tel. Co., 238 Ill. 456, 87 N.E. 521 (1909); Harding v. American Glucose Co., 182 Ill. 551, 55 N.E. 577 (1899), *appeal dismissed*, 187 U.S. 651 (1902).

The stockholder's derivative suit may, of course, be brought *under* federal or state antitrust laws *because* of a breach of a fiduciary duty by corporate management evidenced by a corporate violation of state or federal antitrust laws or a refusal by management to enforce rights granted by such laws.[206] In the latter case, the suit is not brought in equity under the antitrust laws but is a suit by a "dissenting minority stockholder to restrain the majority stockholders from accomplishing what is asserted to be an illegal or ultra vires act."[207] To establish this type of derivative action the plaintiff must prove that the antitrust statute was violated, that the directors knew or should have known their acts were illegal, and that the corporation was injured by the violation.[208] This type of derivative action is not governed by statutory provisions in state and federal antitrust laws but is based upon the fiduciary duty of corporate management created by the general corporation law of the state.[209] Thus, a derivative action based upon this duty and a violation of that duty by antitrust violations is not subject to the limiting language found in provisions of state and federal antitrust laws authorizing private antitrust remedies. Just as derivative actions brought under federal and state antitrust laws against corporate officers and directors can be an effective antitrust remedy, so too derivative actions for breach of a fiduciary duty based on antitrust violations may be a useful and, in some ways,[210] advantageous remedy for private antitrust enforcement.

In view of the existing chaos in state antitrust legislation concerning private injunctive relief and the general need for private antitrust enforcement, a uniform state antitrust law should contain a clear-cut authorization for private injunctive relief by any person threatened by antitrust violations. The *Tentative Draft of a Uniform State Antitrust Act* authorizes private injunctive relief in substantially the same language as that used by section 16 of the Clayton Act.[211] A "person" is authorized to "institute proceedings for injunctive relief, temporary or permanent . . . against threatening loss or damage to his property or business by a violation of this Act."[212] To avoid the problem encountered

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[206] Comment, *Federal Antitrust Law — Stockholders' Remedies for Corporate Injury Resulting From Antitrust Violations: Derivative Antitrust Suit and Fiduciary Duty Action*, 59 MICH. L. REV. 904 (1961).

[207] De Koven v. Lake Shore & M.S. Ry., 216 F. 955, 957 (S.D.N.Y. 1914). *See also* Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125 (Sup. Ct. 1963) (damage action for committing an alleged ultra vires act).

[208] Comment, *supra* note 206, at 913. The "electrical conspiracy" cases have spawned some derivative actions of this type. *See* Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125 (Sup. Ct. 1963) (directors held not liable because of a failure to prove their knowledge of the activity violating the antitrust laws).

[209] *See* Meyer v. Kansas City So. Ry., 84 F.2d 411 (2d Cir.), *cert. denied*, 299 U.S. 607 (1936); Gomberg v. Midvale Co., 157 F. Supp. 132 (E.D. Pa. 1955).

[210] For limitations upon actions brought *under* the antitrust laws, *see* Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143 (1961); Note *Stockholders' Suits and the Sherman Act*, 5 STAN. L. REV. 480 (1953).

[211] Tentative Draft of Uniform State Antitrust Act § 15, 4 TRADE REG. REP. ¶ 30,101, at 35,155 (1965).

[212] *Id.* The other proposed Uniform State Antitrust Law uses the language "to enjoin further violations." Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute*, 39 TEXAS L. REV. 717, 726 (1961). Professor Rahl's proposals for inclusion in a state law do not contain authorization for private injunctive relief. *See* Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753, 780 (1961).

under section 16 of the Clayton Act, the language of a uniform act should not be phrased negatively. Moreover, the use of the word "threatening" instead of "threatened" in the proposed act implies a higher standard of proof of the immediacy of the harm without any justifying explanation. A uniform state antitrust act should also consider the express authorization of shareholder derivative suits. By authorizing such suits and by simplifying derivative suit procedures a generally untapped source of private antitrust enforcement would be encouraged.

The proposed Uniform Act does provide for compensation of a successful plaintiff in injunction cases for his costs and reasonable attorney fees.[213] In this respect, the Act is an important step beyond section 16 of the Clayton Act in which costs and attorney fees are not awarded the successful plaintiff. Since the cost of proving a case does not seem significantly less in state equity cases than it is in treble damage cases,[214] private enforcement in equity will be encouraged by relieving the plaintiff who succeeds in proving his case from the heavy expenses normally attendant to most antitrust cases.

B. Temporary Injunctive Relief

Section 16 of the Clayton Act provides that "upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue" at the instance of "[a]ny person, firm, corporation, or association" against "threatened loss or damage by a violation of the antitrust laws."[215] The federal courts have generally applied the same criteria for private preliminary injunctions as have been applied in cases of public preliminary injunctions under section 4 of the Sherman Act and section 15 of the Clayton Act. The grant or denial of preliminary injunctive relief is largely in the discretion of the trial court;[216] preliminary injunctive relief is not readily granted and when it is granted it is usually done to maintain the status quo or to prevent immediate or irreparable harm;[217] the plaintiff must make out a prima facie case of violation or show a reasonable probability of success upon

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[213] Tentative Draft of Uniform State Antitrust Act § 15, *supra* note 211. *See also* HAWAII REV. LAWS § 205A-11(b) (Supp. 1965).

[214] In equity cases damages need not be proved nor is there a jury. These are the only factors which may decrease the expenses of such cases vis-á-vis treble damage cases.

[215] 15 U.S.C. § 26 (1964).

[216] National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647, 650 (5th Cir. 1962); Texaco, Inc. v. Fiumara, 248 F. Supp. 595, 596 (E.D. Pa. 1965); *see* Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953).

[217] Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292 (3d Cir. 1940); *see* B & W Gas, Inc. v. General Gas Corp., 247 F. Supp. 339 (N.D. Ga. 1965). For an interesting case denying a preliminary injunction against the acquisition of the plaintiff firm by the defendant because maintenance of the status quo might have violated § 7 of the Clayton Act, see Lunkenheimer Co. v. Condec Corp., 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,095 (S.D.N.Y.).

full litigation;[218] and, the court must balance the relative hardships to the parties in deciding whether preliminary injunctive relief should issue.[219]

In the leading case of *Hamilton Watch Co. v. Benrus Watch Co.*,[220] the late Judge Frank further developed the standards governing the grant or denial of preliminary injunctions in private antitrust cases. Judge Frank held that a plaintiff's right to a preliminary injunction is not predicated upon a showing that the plaintiff's right to relief at the end of trial is "absolutely certain" and "without doubt,"[221] since the "judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more deliberate deliberation."[222] The preliminary injunction is, "by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive" and "serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties while the suit goes on, as far as possible in the respective positions they occupied when the suit began."[223] When "the balance of hardships tips decidedly toward" the plaintiff and the other elements are present, it will ordinarily be enough for preliminary injunctive relief "that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."[224] In determining whether the balance of hardships tips decidedly toward the plaintiff, the "judge must consider whether irreparable harm is likely to result to [the] plaintiff if *pendente lite* (*i.e.*, '*immediately*') the injunction is denied, and against this harm he must balance the harm to [the] defendant likely to result if the relief is granted."[225] Since the "hardship plaintiff will suffer . . . may make interlocutory relief imperative where the same showing at a final hearing would not outweigh the hardship the defendant would suffer from a permanent injunction . . . the factor of relative hardship is measured, on an application for interlocutory injunction, with a different yardstick from that used at final hearing."[226]

A few state antitrust laws expressly authorize preliminary injunctive relief at the instance of private parties;[227] the courts of other states have held that

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[218] H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2d Cir. 1963); Crane Co. v. Briggs Mfg. Co., 280 F.2d 747 (6th Cir. 1960); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964); Deltown Foods, Inc. v. Tropicana Prods., Inc., 219 F. Supp. 887, 891 (S.D.N.Y. 1963); Yonkers Raceway, Inc. v. Standardbred Owners Ass'n, Inc., 153 F. Supp. 552 (S.D.N.Y. 1957).

[219] *See, e.g.*, National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647 (5th Cir. 1962); Maryland Cas. Co. v. American Gen. Ins. Co., 232 F. Supp. 620 (D.D.C. 1964); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962).

[220] 206 F.2d 738 (2d Cir. 1953).

[221] *Id.* at 740.

[222] *Id.* at 742.

[223] *Id.*

[224] *Id.* at 740 (footnote omitted).

[225] *Id.* at 743 (footnotes omitted); *see* Ingram v. Phillips Petroleum Co., 259 F. Supp. 176 (D.N.M. 1966).

[226] 206 F.2d at 743 (quoting RESTATEMENT OF TORTS § 941, comment *f* (1939)).

[227] LA. REV. STAT. ANN. § 51:129 (1965). The Virginia antimonopoly law authorizes permanent and preliminary injunctions upon the petition of ten or more citizens of

preliminary injunctive relief is available to private litigants although the state antitrust law does not expressly provide for such relief.[228] In states in which the question of preliminary injunctive relief has not been presented, the fact that state courts have granted permanent injunctive relief for antitrust violations despite the absence of statutory authority indicates that the lesser step of preliminary injunctive relief would also be granted if a meritorious case were presented.[229] The grounds for invoking private preliminary injunctive relief at the state level, albeit the cases are few and far between, seem to parallel the standards followed by the federal courts.

At the federal level private preliminary injunctive relief has been requested in three types of cases: concerted refusals to deal,[230] merger cases allegedly violating section 7 of the Clayton Act,[231] and unilateral refusals to deal with plaintiffs by their defendant suppliers because the plaintiffs have brought treble damage suits for antitrust violations.[232] In these types of antitrust cases the immediacy of the damage and its irreparable harm often demand preliminary judicial action. In cases of concerted refusals to deal, incalculable and irreparable harm may be done before full litigation of the antitrust case is possible since the very nature of the conduct entails the foreclosure of either the plaintiff's source of supply[233] or market outlets.[234] In merger cases a peril is often imminent because the defendant may be able to absorb the plaintiff before full litigation on the merits is held,[235] or because injury to the supplier and distributor relationships, financial standing, good will, general business relationships, and employee morale of the business being acquired far outweigh the injury to the acquiring company caused by temporary delay in the merger.[236]

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any county or city. VA. CODE ANN. § 59-32 (1950). The language of the Hawaii antitrust law and the Washington antitrust law seem broad enough to authorize private preliminary injunctions, although they do not expressly authorize such relief. HAWAII REV. LAWS § 205A-11(b) (Supp. 1965); WASH. REV. CODE ANN. § 19.86.090 (Supp. 1966).

[228] *See* cases cited note 17 *supra.*

[229] *Id.*

[230] *See, e.g.*, Yonkers Raceway, Inc. v. Standardbred Owners Ass'n, Inc., 153 F. Supp. 552 (S.D.N.Y. 1957); Evening News Publishing Co. v. Allied Newspaper Carriers, 149 F. Supp. 460 (D.N.J. 1957), *cert. denied*, 360 U.S. 929 (1959).

[231] *See, e.g.*, Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962).

[232] *See, e.g.*, Klein v. American Luggage Works, Inc., 206 F. Supp. 924 (D. Del. 1962), *rev'd*, 323 F.2d 787 (3d Cir. 1963); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964).

[233] *See, e.g.*, Yonkers Raceway, Inc. v. Standardbred Owners Ass'n, Inc., 153 F. Supp. 552 (S.D.N.Y. 1957) (racehorses for plaintiff's race track). In Graham v. Triangle Publications, Inc., 344 F.2d 775 (3d Cir. 1965), the court affirmed a trial court refusal to issue a preliminary injunction against a refusal to deal on the theory that the plaintiff's damages were readily ascertainable.

[234] *See, e.g.*, Evening News Publishing Co. v. Allied Newspaper Carriers, 149 F. Supp. 460 (D.N.J. 1957), *cert. denied*, 360 U.S. 929 (1959) (distributors of newspapers).

[235] *See, e.g.*, Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc., 328 F.2d 830 (6th Cir. 1964); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).

[236] *See, e.g.*, Crane Co. v. Briggs Mfg. Co., 280 F.2d 747 (6th Cir. 1960); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962).

Temporarily enjoining unilateral refusals to deal with treble damage plaintiffs, a far more troublesome question,[237] is often argued to be necessary because of the irreparable harm caused by depriving a retailer of a name product essential to the retailer's business,[238] or because the peculiarities of the plaintiff's business demand that the plaintiff have defendant's line of products,[239] or because the defendant represents the sole source of supply of a particular product the plaintiff claims is necessary to his business.[240] While the hardship to the plaintiff may be clearly demonstrated, the plaintiff's equities usually stumble over the long-recognized, but increasingly narrowed, *Colgate* doctrine[241] preserving the "right of [a] trader or manufacturer engaged in an entirely private business . . . to exercise his own independent discretion as to parties with whom he will deal."[242] Preliminary injunctions under section 16 of the Clayton Act for unilateral refusals to deal which are used to discourage treble damage suits, therefore, encounter the obvious difficulty of not meeting an express requirement of section 16: a showing of an antitrust violation. For, if the *Colgate* doctrine still has any vitality, it clearly means that a truly unilateral refusal to deal is not a "contract, combination, or conspiracy" and therefore does not violate the antitrust laws despite its coercive economic effect,[243]

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[237] *See generally* Alexander, *Private Antitrust Actions for Refusal To Deal*, 6 ST. LOUIS U.L.J. 489 (1961); Comment, *Unilateral Refusals To Deal as a Method of Deterring Private Antitrust Litigants: A Legitimate Method of Economic Coercion?*, 42 NEB. L. REV. 825 (1963); Comment, *Refusals To Deal with Antitrust Suitors: "Doric Simplicity" or "Dirty Pool"?*, 39 U. DET. L.J. 414 (1962).

[238] P.W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 63 (S.D.N.Y. 1961), *rev'd sub nom.*, House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962); Airfix Corp. of America v. Aurora Plastics Corp., 222 F. Supp. 703 (E.D. Pa. 1963).

[239] *See, e.g.*, Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964).

[240] *See, e.g.*, H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13 (2d Cir. 1963); National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647 (5th Cir. 1962).

[241] United States v. Colgate & Co., 250 U.S. 300 (1919). The Supreme Court has gradually been narrowing the scope of the *Colgate* doctrine in a long series of cases. *See, e.g.*, United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 729 (1944); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Judge McLean has suggested that the "Colgate case has been in failing health for years, and may be found, when the question next arises in the Supreme Court, to have expired completely." Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 528 (S.D.N.Y. 1965). Section 2(a) of the Clayton Act, however, is some evidence of congressional approval of unilateral refusals to deal: "That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . . ." 15 U.S.C. § 13(a) (1964). Since the proviso is part of the Robinson-Patman Act and uses the words "nothing herein contained," it may be also argued that the preservation of unilateral refusals to deal only applies to Robinson-Patman Act cases and Congress implicitly rejected the doctrine under other major antitrust laws.

[242] 250 U.S. at 307. For excellent studies of the unilateral refusal to deal see Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 HARV. L. REV. 655 (1962). The right to refuse to deal is generally more limited in regulated industries, particularly where the regulated industry is a monopoly. *See* Parker, *Individual Refusals To Sell in Regulated Industries*, 41 TEXAS L. REV. 295 (1962).

[243] *See, e.g.*, Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 872 (2d Cir. 1962). *But see* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743, 746 (E.D. Pa. 1964).

unless the refusal to deal has some aspect of concerted action or is done pursuant to a scheme of monopolization or an attempt to monopolize.[244]

Yet there is undeniable appeal to the argument favoring injunctive relief under these circumstances. The "right" of business to refuse to deal is not a basic constitutional right and has been limited in areas where paramount public policy dictates a limitation or elimination of the right to secure some greater public good such as automobile franchising,[245] labor relations,[246] and civil rights.[247] Perhaps the *Colgate* doctrine should be viewed in light of the historic limitation of the power of equity courts — the impossibility of enforcing the equity decree — rather than as a sanctified right of modern business. This should be particularly true where the business relationship involved is largely a mechanical relationship based upon standard operating procedures rather than a closely-knit relationship based upon trust, confidence, and reliability which would require continual judicial supervision.[248] When the public policy inherent in the enforcement of the antitrust laws, particularly treble damage suits,[249] is weighed against the largely psychological inconvenience and dislike of compulsion to deal with a person bringing a treble damage action, the impossibility of effective enforcement of the injunction without continual supervision should be the only limitation upon injunctive relief.[250] When, of course, factors other than merely the plaintiff's treble damage suit justify the refusal to deal,[251] or enforcement of the degree would be difficult or impossible,[252] or the plaintiff's damages would not be excessively grave and irreparable,[253] the values inherent in a business's freedom to refuse to deal should outweigh the plaintiff's inconveniences and the policy in favor of treble damages enforcement.

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[244] Lorain Journal Co. v. United States, 342 U.S. 143, 150 (1951). Simpson v. Union Oil Co., 377 U.S. 13 (1964), may have opened a new theory of attacking unilateral refusals to deal which would not necessarily require a showing of conduct violative of § 2 of the Sherman Act. *See* Note, *"Combinations" in Restraint of Trade: A New Approach to Section 1 of the Sherman Act*, 1966 UTAH L. REV. 75. *See also* Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir. 1967).

[245] Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221–25 (1964).

[246] *See* Labor-Management Relations Act of 1947, 29 U.S.C. §§ 159, 160 (1964).

[247] Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to h-6 (1964).

[248] In Weingartner v. Union Oil Co., 1966 Trade Cas. ¶ 71,757 at 82,501 (N.D. Cal. 1965), the court implicitly adopted this standard in preliminarily enjoining a refusal to deal with a treble-damage plaintiff.

[249] *See* Loevinger, *Private Action — The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

[250] *See* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962). *Contra*, House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962).

[251] *Cf.* Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963) (plaintiff's price cutting disrupted defendant's other retail outlets).

[252] *Cf.* H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13 (2d Cir. 1963), in which the Court of Appeals reversed the lower court injunction ordering defendant, who controlled the only source of supply, to furnish plaintiff with a particular color of marble required by a government contract.

[253] In House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962), six of the original forty-one parties in the initial spurious class action, *see* P.W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.D.N.Y. 1960) (treble damage suit) requested temporary injunctive relief following the Supreme Court's affirmance of an F.T.C. cease and desist order against Simplicity. *See* FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959). Only Husserl pursued injunctive relief since the five other plaintiffs found different sources for dress patterns. When other sources for the product are

So long as the *Colgate* doctrine continues to have some vitality, suits to enjoin purely unilateral refusals to deal with antitrust treble damage plaintiffs cannot be brought under section 16 of the Clayton Act. Temporary equitable relief in the form of a preliminary injunction should be available in the proper case, however, under the general equity powers of a court to preserve the status quo and prevent irreparable harm, and to protect the jurisdiction of the court over the treble damage suit.[254]

At the state level there has been relatively little development of private preliminary injunctive relief in antitrust cases. The general failure of public and private enforcement of state antitrust laws rather than a lack of necessity for private preliminary injunctive relief seems to be the primary explanation for the paucity of litigation. Assuming state antitrust enforcement by both public officials and private individuals is desirable and takes place, state antitrust laws should include express authorization for private preliminary injunctive relief. Since many local restraints of trade tend to be of the predatory and vicious per se type,[255] private enforcement by preliminary and permanent injunctive relief should be expressly authorized to prevent irreparable harm and to encourage private action as a supplement to public enforcement.

V. CONCLUSIONS

Any survey of a legal topic necessarily tends to be summary in nature and legalistic in form, and on occasion the reader is lost in the web of legalisms or the morass of plentiful footnotes. It is hoped that upon being freed of these entanglements, some of the broader implications of this study may become apparent.

One of the unique characteristics of American antitrust enforcement has been the forum of enforcement and the remedies available to enforcement officials and private parties. In the main, traditional antitrust enforcement has been carried on in courts of general jurisdiction rather than in specialized courts, as in England, or solely by administrative agencies. Even the administrative decisions of the Federal Trade Commission are subject to extensive judicial review. In addition, private parties have carried a portion of the enforcement burden, either by suits in equity or by treble damage claims.

One may question whether this is an intelligent manner in which to implement government economic regulation or whether the implementation of over-all economic policy can be effectively coordinated when the tools for implementing that policy are scattered over three constitutionally independent branches of government. There is, of course, logical appeal — to the American mind at least — in the idea that there is virtue in dispersing political power and that concentrated economic power is dangerous to the health of the body politic. Consequently, in addition to the inertia of tradition and vested politi-

available the plaintiff's damage should not ordinarily be considered irreparable. The economic peculiarities of a particular business, however, may make the defendant's particular product essential to the plaintiff's business. *See* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962). This case has been criticized. 76 HARV. L. REV. 848 (1963).

[254] Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962).

[255] *See* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 228–30 (1964).

cal interest, any suggestion that antitrust enforcement take place in a forum other than a judicial one or that antitrust remedies be implemented without the imprimatur of a judicial decree must be accommodated to basic American political and economic beliefs.

Yet the limitations of the judicial process and the adversary system make antitrust enforcement in the courts somewhat less than satisfactory. This becomes particularly clear when one surveys equitable relief under the antitrust laws. The vast majority of government civil cases are terminated by consent decrees; injunctive decrees arrived at with little judicial involvement aside from the ritualistic stamping of the decree by the court as a judicially entered injunction. When litigation does occur, the court is usually faced with a protracted and complicated trial involving highly sophisticated economic and business issues with far-reaching economic consequences. Many courts have professed reluctance to exercise the full scope of their power in light of the complexities of the issues and the long range implications of issuing a decree based on anything other than expertise in the particular business involved. Yet in many cases, particularly cases involving structural problems, radical surgery is necessary to cure the particular antitrust violations that have occurred and to eliminate a recurring source of future antitrust violations.

Considerable thought and empirical research should be undertaken on the question of whether public remedial relief in antitrust cases can be better implemented by a different tribunal than a court applying remedies within the framework of equity jurisdiction. While it is probably unfeasible and undesirable to remove totally this aspect of antitrust enforcement from the adversary system, judicial involvement could be minimized by further refinement of the consent decree process. Judicial timidity to order far-reaching antitrust relief in litigated cases may be minimized by making greater use of the advisory function of the F.T.C.[256] in framing antitrust equity decrees. Improvement of the consent decree process might include a greater awareness of its potential, a broader standard of intervention for interested parties when the decree has industry-wide implications, and a greater willingness of the enforcement agencies to devote additional resources to the formulation and enforcement of decrees. F.T.C. involvement in formulating decrees in Antitrust Division cases can only come about after the development of better cooperation by the Commission and the Division and a relatively massive infusion of funds into the F.T.C. to expand and improve its undermanned staff.[257] This last named factor can only be solved by Congress, which exercises a well known but seldom mentioned restraint upon antitrust enforcement by its control of the purse.

At the state level there are signs of a revival of state antitrust law enforcement. Many state statutes, however, are in serious need of revision. The substantive language of many is confusing and archaic, the procedures for enforcing others are strange and antiquated, and the remedies of others are ex-

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[256] Federal Trade Commission Act § 6(e), 15 U.S.C. §§ 46(e), 47 (1964).

[257] *See* Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609 (1967).

cessive or incomplete.[258] If state antitrust enforcement is to be revived, most state antitrust statutes must be substantially updated to ensure conformity to current practice and to ensure that the "remedy fits the crime." A survey of state antitrust equitable relief reveals a confusing morass of differing legal standards and varying substantive coverage. In the area of equitable relief the *Tentative Draft of a Proposed Uniform State Antitrust Law* — with some minor modifications — is an important step in the direction of updating state antitrust statutes to useful and workable tools for local antitrust enforcement.

[258] C.H. Albers Comm'n Co. v. Spencer, 205 Mo. 105, 103 S.W. 523 (1907), *rehearing denied sub nom.*, C.H. Albers Comm'n Co. v. Milliken, 245 Mo. 368, 150 S.W. 712 (1912), *appeal dismissed per curiam for want of jurisdiction*, 232 U.S. 719 (1913), in which the failure to include injunctive relief as a private antitrust remedy led the Missouri Supreme Court to hold that the damage remedy authorized by the statute was exclusive.

UTAH LAW REVIEW

Member, National Conference of Law Reviews

VOL. 1967 JULY